

State of Hawaii  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Boating and Ocean Recreation  
Honolulu, Hawaii 96819

June 23, 2017

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

Kaua'i

**Request for Approval of Lease Agreement with Makai Marina, LLC for  
Use of a Portion of Property as a Work, Storage, Dredge Material Dewatering Site, and  
Haul Route Tax Map Key (4) 1-2-006:003 (portion)**

**Project: Kikiaola Light Draft Harbor Maintenance Dredging  
Kekaha, Kaua'i, Hawaii**

**PROJECT DESCRIPTION:**

The U.S. Army Corps of Engineers, Civil and Public Works Branch (ACOE), is planning to dredge the entrance channel and a portion of the harbor basin at Kikiaola Light Draft Harbor, Kaua'i, Hawaii (KLDH). This dredging project is necessary to remove accumulated sand/sediment that is currently posing a navigation and safety hazard. Federal funds have been secured to implement the project. The project is expected to commence between November 2017 and October 2018.

**REQUEST:**

The Division of Boating and Ocean Recreation (DOBOR) is requesting that the Board of Land and Natural Resources (Board) approve a Lease Agreement between DOBOR and the owner of the property adjacent to KLDH, Makai Marina, LLC (Landowner), for use of a portion of their property as the ACOE's contractor's work, storage, and dredge material dewatering site and a haul route from KLDH to Kaumualii Highway. The State's Office of the Attorney General, ACOE Office of Counsel, and Landowner have reviewed the draft Lease Agreement and are acceptable to its terms and conditions. A copy of the draft Lease Agreement is attached as Exhibit 1.

**LEASE AGREEMENT:**

In accordance with the "Project Cooperative Agreement (PCA) Between the Department of the Army and the State of Hawaii for Construction of the Kikiaola Light Draft Harbor Navigation Improvements, Island of Kauai, Hawaii, dated August 8, 2005," DOBOR is responsible to provide a dredge material dewatering site for maintenance dredging projects implemented by ACOE. The purpose of the proposed Lease Agreement is to fulfill DOBOR's responsibility to provide a dredge material dewatering site.

The proposed Lease Agreement allows DOBOR, on behalf of ACOE and their contractor, to utilize a total of 2.51 acres of land for use of a portion of the Landowner's property as a work, storage, and dredged material dewatering site (1.55 acres) as well as a haul route (0.96 acres) to transport the dredged material from KLDH to the dewatering site and from the dewatering site to Kaumualii Highway. The dredged material, after dewatering, will be hauled and properly disposed of at the nearby Kekaha Landfill.

The term of the Lease Agreement is for a period of 11 months with the option of holding over use of the property on a month-to-month basis if the project is not completed within 11 months. Both the Landowner and DOBOR have the right to terminate the month-to-month tenancy with at least 90 days' prior written notice to the other party.

The base rent for the Lease Agreement to be paid by DOBOR is \$2,500.00 per month. Payment will be made on a monthly basis until the Lease Agreement is expired, cancelled, or terminated pursuant to the terms of the Lease Agreement.

As a condition of the lease agreement, the Landowner is requiring DOBOR, at its sole expense, to erect a temporary gate at the KLDH entrance to their property and place crushed rock on either end of the haul route within their property for dust control. DOBOR has agreed to these conditions.

HRS CHAPTER 343 AND HAR CHAPTER 11-200 EXEMPTION:

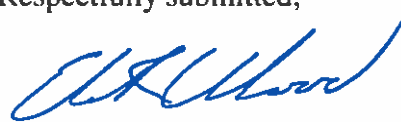
At the Board's November 10, 2016 meeting, the use of State lands by ACOE's contractor and State funds for payment of rent for use of the Landowner's property were declared exempt from the requirements of Hawaii Revised Statutes, Chapter 343 and Hawaii Administrative Rule 11-200. The exemption also included preparation of an Exemption Notification and required consultations. It is noted that the November 10, 2016 exemption request referenced Kikiaola Land Co., Limited as landowner when they are rather the land agent for the owner, Makai Marina, LLC. A copy of the November 10, 2016 Board approval and Exemption Notification are attached as Exhibit 2.

RECOMMENDATION:

That the Board:

Approve the proposed Lease Agreement between the Department of Land and Natural Resources, Division of Boating and Ocean Recreation and Makai Marina, LLC and delegate authority to the Chairperson to execute the agreement on behalf of the Department.

Respectfully submitted,



Edward R. Underwood  
Administrator

APPROVED FOR SUBMITTAL:



Suzanne D. Case  
Chairperson

Attachments: Exhibit 1 – Draft Least Agreement  
Exhibit 2 – BLNR EA Exemption Approval (November 10, 2016 meeting)

STATE OF HAWAII

LEASE No. \_\_

between  
MAKAI MARINA, LLC, a Hawaii limited liability company  
Lessor

and

STATE OF HAWAII  
by its  
BOARD OF LAND AND NATURAL RESOURCES  
Lessee

Covering

Vacant land located at Waimea, Island of Kauai, State of Hawaii

Tax Map Key No. (4) 1-2-006:003 (Portion)

For Kikiaola Small Boat Harbor Maintenance Dredging  
(ACOE Project)

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## LEASE AGREEMENT

THIS INDENTURE OF LEASE made on \_\_\_\_\_ by and between MAKAI MARINA, LLC, a Hawaii limited liability company, whose address is Post Office Box 367, Waimea, Hawaii 96796, hereinafter called "Lessor," and the STATE OF HAWAII, hereinafter called "Lessee," by its Board of Land and Natural Resources, pursuant to Section 171-30, Hawaii Revised Statutes, whose address is 1151 Punchbowl Street, Honolulu, Hawaii 96813, for the use of the DEPARTMENT OF LAND AND NATURAL RESOURCES, Division of Boating and Ocean Recreation, whose address is 4 Sand Island Access Road, Honolulu, Hawaii 96819, hereinafter called "Department."

### W I T N E S S E T H:

#### ARTICLE I - DEMISE

Section 1.1 Premises. The Lessor in consideration of the rent and covenants hereinafter reserved and contained and on the part of the Lessee to be paid, observed and performed, does hereby demise and lease unto the Lessee the Premises situate at Waimea, Island of Kauai, Hawaii, containing an area of approximately two and one half acres of TMK No. (4) 1-2-006:003 Portion, as shown on Exhibit "A," attached hereto and made a part hereof (the "Premises").

Section 1.2 Term. The term of this lease shall be for a term of eleven (11) months and Lessee's obligations to pay the rent hereunder shall commence upon the receipt by Lessee and Lessor of notice from the Department of Army/Army Corps of Engineers ("DOA/ACOE") of the date operations on the Premises will commence, and the term shall end eleven (11) months later, unless sooner terminated as set forth in this Lease, PROVIDED, HOWEVER, that said term shall be contingent at all times upon the availability and allotment by the Director of the Department of Budget and Finance of public funds to the Department of Land and Natural Resources and the Department of Accounting and General Services to pay such rent. The parties acknowledge that the DOA/ACOE will provide a formal notice of commencement to Lessor and Lessee, and projects that such notice of commencement of operations will occur between November 2017 and October 2018.

Section 1.3 Option to Cancel. Lessee shall have the right to cancel this lease at any time under the following conditions:

- a. Should Lessee's public funding or allotment by the Director of the Department of Budget and Finance be reduced or cut or; and,
- b. Lessee provides Lessor with appropriate evidence of a above and gives Lessor a minimum of ninety (90) days prior written notice to Cancel.

It is further understood that once Lessee has exercised its right to cancel, said notice is irrevocable.

Section 1.4 Quiet Enjoyment. Upon payment by Lessee of the rent hereinafter reserved and upon observance and performance of the terms, covenants and conditions herein contained and to be observed and performed by Lessee, Lessee shall peaceably hold and enjoy the Premises for the term and any extensions thereof without hindrance or interruption by Lessor or any other person lawfully or equitably claiming by, through or under the Lessor, except as herein otherwise expressly provided.

Section 1.5 Possession. In the event of Lessor's inability to deliver possession of the Premises, hereinbelow at the commencement of the lease term, Lessor shall be liable for any damages caused thereby. In such event, no rental shall be payable by Lessee to Lessor for any portion of the lease term prior to lease commencement after actual delivery to Lessee of possession of the Premises, and the Lessee, at its option, may cancel the lease or extend the date of termination of this lease by a period of time equal to the total number of days during which the Lessor was unable to deliver possession of the Premises to Lessee, and the parties shall enter into a supplemental agreement amending and fixing the extension of the lease term as hereinabove provided. If Lessee, with Lessor's permission, enters into possession of the Premises prior to commencement of the lease term, all of the terms, covenants and conditions of this lease shall apply during the prior period.

## ARTICLE II - RENT AND OTHER CHARGES

Section 2.1 Base Rent. In consideration of this lease, the Lessee agrees to pay the Lessor as monthly base rent for the Premises the sum of TWO THOUSAND FIVE HUNDRED AND NO/100 DOLLARS (\$2,500.00), payable monthly in advance on the first day of each month to the Lessor (federal Taxpayer Identification No. \_\_\_\_\_) at \_\_\_\_\_ or at any other place the Lessor in writing may designate, on the days and in the manner aforesaid; and that if any installment of rent shall not be promptly paid when due or within thirty (30) days thereafter, rent shall bear simple interest at the rate of ten percent (10%) per annum from said date until paid.

Lessor shall provide a written invoice for Lessee's payment of rent and operating cost at least thirty (30) days before payment is due, at the location and in the manner stipulated under ARTICLE XII - NOTICE of this lease.

Lessor expressly waives any interest or late charges, if any, for any late payments or underpayments of rent or any other charges prior to the execution of this document.

Should the commencement date precede the date of execution of the lease document, all rent due (as adjusted per Section 1.6 hereinabove, if applicable) shall become due and payable on the date of the execution of the lease. All rent due in arrears shall be paid by the Lessee within



forty-five (45) calendar days from the date of the execution of the lease.

Should there be a change of Lessor, an amendment of lease reflecting such change must be executed between the Lessee and the new Lessor, and the new Lessor must provide a current tax clearance per Section 14.12 Tax Clearances hereinbelow, before rent payment can be made to the new Lessor; initial rent payment to the new Lessor shall be due within sixty (60) days after the execution of the amendment to the lease.

Section 2.2 Parking. Lessor shall allow Lessee to use the Premises to park vehicles and equipment.

Section 2.3 Security Deposit. No security deposit of any kind shall be required to be paid by Lessee.

Section 2.4 Real Property Tax (RPT). Lessor shall be liable for all RPT affecting the Property.

Section 2.5 General Excise Taxes. The Lessee shall pay to the Lessor as additional rent, together with each payment of rent or any other payment required hereunder which is subject to the State of Hawaii general excise tax on gross income, gross income tax, and all other similar taxes imposed on the Lessor on the rent or other payments in the nature of a gross receipts tax, sales tax, privilege tax or the like (excluding Federal or State of Hawaii net income taxes), whether imposed by the United States of America, the State of Hawaii, the City and County of Honolulu, or any other duly authorized taxing body, an amount which, when added to the rent or other payment shall yield to the Lessor, after deduction of all taxes payable by the Lessor with respect to all payments, a net amount equal to that which the Lessor would have realized from the payments had no taxes been imposed.

Section 2.6 Operating Costs and Utilities. Lessor shall be solely responsible for the total operating costs of the Property which shall include, without limitation, all costs of any kind, paid or incurred by the Lessor in operating, cleaning, equipping, protecting, lighting, electricity, repairing, managing, insuring, replacing and maintaining the Property, including real property tax, utility service costs, except for charges specified in Section 2.8 hereinbelow.

Section 2.7 Conveyance Tax. Lessor shall be solely responsible for any State of Hawaii conveyance tax which may be payable as a result of this lease.

Section 2.8 Other Charges. Lessee shall be solely responsible and shall contract and pay directly to the provider of the following services, if applicable: electricity, gas, refuse collection, water, and internet services together with any taxes thereon.

### ARTICLE III - USE

Section 3.1 Use of Premises. The Premises will be secured by the Department of Land and Natural Resources for the use of the Department of the Army (DOA), as further set forth in Section 14.9 below. The Premises condition is "AS IS." The Premises is to be used and occupied for dewatering of dredged material, as well as for field offices, storage containers, equipment and material storage, base yard, and parking. Lessee shall not use, occupy, or permit the use or occupancy of the Premises for any purpose which is, directly or indirectly, forbidden by law, ordinance, or governmental or municipal regulation or order, or which may be dangerous to life, limb, or property. Lessee shall not permit the maintenance of any public or private nuisance, and shall not permit any act or thing which may disturb the quiet enjoyment of others.

LESSEE ACKNOWLEDGES THAT NEITHER LESSOR, NOR ANY AGENT OR OTHER REPRESENTATIVE OF LESSOR HAS MADE REPRESENTATIONS OR WARRANTIES OF ANY KIND WHATSOEVER, EITHER EXPRESS OR IMPLIED, WITH RESPECT TO THE PREMISES OR ANY MATTERS RELATED THERETO. LESSEE ACKNOWLEDGES THAT THERE ARE NO WARRANTIES OR ANY KIND WHATSOEVER, EITHER EXPRESS OR IMPLIED, WITH RESPECT TO THE PREMISES, AND LESSEE IS LEASING THE PREMISES IN AN "AS IS," "WHERE IS" CONDITION "WITH ALL FAULTS."

Section 3.2 Common Areas The Premises includes access through parts of the parcel to a public road.

Section 3.3 Observance of Laws. Lessee will at all times during the term observe and comply with all laws, ordinances, and rules and regulations now or hereinafter made by any governmental authority and applicable to the occupancy or use of the Premises or the conduct of any business therein or to the use of the common areas.

Section 3.4 Waste, Nuisance or Unlawful Activity. Lessee agrees that it will not commit or permit any waste on the Premises, or maintain or permit to be maintained a nuisance thereon, or use or permit the Premises to be used in an unlawful manner.

At the termination of this lease, by lapse of time or otherwise, Lessee shall deliver up the Premises to Lessor in as good condition as on the commencement date, ordinary wear and tear excepted, and upon such termination of this lease, Lessor shall have the right to re-enter and resume possession of the Premises. Lessee shall, at its own expense, keep, repair and maintain improvements now existing or hereafter constructed or installed on the Premises in good and safe order, condition and repair, reasonable wear and tear excepted.

Section 3.5 Subletting and Assignment. The Lessee agrees that neither the Premises nor any part thereof shall be sublet, mortgaged or assigned nor will the Lessee part with the possession of the whole or any part thereof without the consent in writing of the Lessor first having been obtained, which consent shall not be unreasonably withheld. Lessor and Lessee agree that the use of the Premises by another state agency or by the DOA and its employees, or

its consultants, contractors, subcontractors, agents, and architects, shall not constitute an assignment or subletting of the Premises by Lessee to the DOA and shall not require Lessor's consent and shall be upon the same terms and conditions contained in this lease, provided that there is no increase in the use of Premises.

#### **ARTICLE IV - HAZARDOUS MATERIALS**

Section 4.1 Lessee's Covenants. Lessee shall not cause or permit the escape, disposal or release of any hazardous materials in or upon the Premises. Lessee shall not allow the storage or use of such materials in any manner not sanctioned by law or by the highest standards prevailing in the industry for the storage and use of such materials, nor allow to be brought into the Premises any such materials except to use in the ordinary course of Lessee's business, and then only after written notice is given to Lessor of the identity of such materials. In addition, Lessee shall execute affidavits, representations and the like from time to time at Lessor's request concerning Lessee's best knowledge and belief regarding the presence of hazardous materials on the Premises placed or released by Lessee.

Section 4.2 Lessor's Representations, Warranties and Obligations. Lessor represents and warrants to Lessee that Lessor has no liability under, has never violated, and is presently in compliance with all environmental laws regarding hazardous materials applicable to the Premises and the Property, and to the best of Lessor's knowledge, there does not now exist or ever existed any environmental condition relating to hazardous materials on the Premises or the Property.

Lessor agrees to release, indemnify and hold Lessee harmless from any damages or claims from any environmental condition or violation of any environmental laws resulting from the use or placement of hazardous materials on the Premises or Property prior to the lease commencement date even if not discovered until after the lease has commenced. This indemnity shall survive the lease termination date and shall be in addition to Lessor's obligations for breach of the above representations and warranties.

Section 4.3 Dredged Materials. For the purpose of this lease, dredged materials are not considered hazardous materials.

Section 4.4 Definitions. For the purpose of this lease "hazardous material" shall mean any pollutant, toxic substance, hazardous waste, hazardous material, hazardous substance, or oil as defined in or pursuant to the Resource Conservation and Recovery Act, as amended, the Comprehensive Environmental Response, Compensation, and Liability Act, as amended, the Federal Clean Water Act, or any other federal, state, or local environmental law, regulation, ordinance, rule, or bylaw, whether existing as of the date hereof, previously enforced, or subsequently enacted.

#### **ARTICLE V - MAINTENANCE, REPAIRS AND ALTERATIONS**

Section 5.1 Lessee's Maintenance and Repair of the Premises. The Lessee will at its own cost during the term of this lease and any extensions thereof keep the Premises in a good and safe condition, reasonable use and wear and tear and unavoidable casualty excepted. Lessee's obligations, under this section, do not include structural repairs, common areas of the Property, and natural wear, decay, or damage by the elements or other casualty (occurring without fault of the Lessee or other persons permitted by the Lessee to occupy or enter the Premises or any part thereof).

Section 5.2 Repairs by the Lessor. The Lessor shall keep the common areas and the structural integrity of the Property in good condition and repair during the term of the lease. The Lessor shall diligently proceed with any repairs affecting or causing serious threats to health and safety no later than three (3) days and no later than thirty (30) days for other repairs after written notice by Lessee. If Lessor fails to make repairs in the requisite time period, Lessee shall have the right to repair and offset said cost of repairs from the monthly rent or immediately demand monetary reimbursement in legal tender of the United States of America from the Lessor which shall be paid within five (5) days of said written demand by Lessee.

No compensation or claim will be allowed by the Lessor by reason of inconvenience or annoyance arising from the necessity of repairing, altering, or improving any portion of the building of which the Premises hereby leased are a part, however the necessity may occur.

Section 5.3 Lessor's Right of Entry. The Lessee will allow the Lessor and the agents of the Lessor, at reasonable times and upon prior notice, to enter upon the Premises and examine the condition thereof and to make repairs thereto.

Section 5.4 Alterations. Lessee will not make any alterations or additions whatsoever to the Premises without first obtaining Lessor's written approval of the plans and specifications thereof, which shall not be unreasonably withheld.

All alterations, additions, or other improvements to the Premises, whether temporary or permanent, made either by Lessor or Lessee, shall be for the benefit of Lessor, shall not be removed unless consented to in writing by Lessor, and shall be deemed to become an integral party of the Premises.

If, during the lease term, any change, addition or alteration of the Premises shall be required to be made by any law, rule or regulation or any governmental authority, Lessor must first give its written consent, which consent shall not be unreasonably withheld and such change, addition, or alteration shall then be made by Lessee at Lessee's sole expense, if such change, addition, or alteration was due or caused by the Lessee.

## **ARTICLE VI - LESSEE'S RESPONSIBILITIES, LIABILITY, AND INSURANCE**

Section 6.1 Lessee's Responsibilities. The Lessee shall be responsible for injury caused

by the Lessee's officers and employees in the course and scope of their employment to the extent that the Lessee's liability for such damage or injury has been determined by a court or otherwise agreed to by the Lessee. The Lessee shall pay for such damage and injury to the extent permitted by law provided that an appropriation is enacted for that purpose.

Section 6.2 Liability of Lessor. The Lessor shall not be liable to the Lessee for damage to person or property arising for any reason, except that the Lessor shall be liable to the Lessee for damage to the Lessee resulting from the negligent act or omission of the Lessor or its authorized representatives.

Section 6.3 Insurance. Lessee, as a sovereignty, is self-insured and therefore insurance, including but not limited to, public liability, property damage, fire, and business interruption insurance, is not required.

Section 6.4 Fire Insurance. The Lessor will carry fire and extended coverage insurance on the Property of which the Premises are a part, where applicable. The insurance shall cover the structural portion of the building, plus all structural improvements constructed by the Lessee. To the extent that coverage of Lessee's structural improvements shall increase the insurance premium otherwise payable by the Lessor, Lessee shall upon demand, reimburse the Lessor for the increased cost. The term "structural improvements" as used herein shall not include "trade fixtures."

## ARTICLE VII - PROPERTY OF LESSEE

Section 7.1 Property of Lessee. All personal property of any kind or description whatsoever on the Premises shall be at the Lessee's sole risk, and the Lessor shall not be liable for any damage done to or loss of such personal property or damage unless caused by the negligent act or omission of Lessor or its authorized representatives.

## ARTICLE VIII - CONDEMNATION

Section 8.1 Condemnation. In the event during the term of this lease or any extensions thereof, the Premises or any part thereof shall be taken or condemned by any authority having the power of eminent domain, then and in such event, this lease shall cease and terminate as of the date Lessee is required to vacate the Premises, and the rent reserved shall be apportioned and paid up to that date. All compensation and damages payable for or on account of the Premises and common areas and the Property thereof, except for improvements constructed or owned by the Lessee, shall be payable to and be the sole property of the Lessor. Lessee shall be compensated for all improvements constructed or owned by the Lessee. The Lessee shall not be entitled to any claim against the Lessor for condemnation of or indemnity for the leasehold interest of the Lessee.

Section 8.2 Partial Taking. In case only part of the Premises shall be so taken or

condemned, the rent thereafter payable for the unexpired remainder of the term shall be reduced in the same proportion that the area of the Premises so taken or condemned bears to the total area of the Premises hereby demised, PROVIDED, HOWEVER, that either party has the right to terminate this lease at its option in the event of a partial taking of at least 25% of the Premises without further obligation under this lease.

#### ARTICLE IX - CASUALTY

Section 9.1 Fire. The Lessee shall in case of fire give immediate notice thereof to the Lessor, and in case the Premises and other improvements in which the Premises are located are totally or partially destroyed or damaged by fire or other cause as to render the Premises and other improvements in which the Premises are located totally or partially inaccessible or unusable or untenable for a period exceeding one hundred twenty (120) days then this lease may be terminated at the option of either party hereto; that if the Premises and other improvements in which the Premises are located are damaged as aforesaid so as to render the Premises and other improvements in which the Premises are located totally or partially inaccessible or unusable or untenable for a period of more than sixty (60) days but not exceeding one hundred twenty (120) days, there shall be an abatement of fifty percent (50%) of the basic rent specified in Section 2.1 hereof during the period the Premises cannot be occupied; that if the Premises cannot be occupied as aforesaid for a period of less than sixty (60) days, there shall be no abatement in rent.

If twenty-five percent (25%) or more of the rentable area of which the Premises form a part cannot be occupied due to fire or other casualty or if the Lessor is unable to obtain a building permit to repair any portion of the Premises which have been damaged by fire or other casualty or which have been declared unsanitary or unsafe by any governmental agency or authority, then the Lessor may cancel this lease, even though the Premises may not be damaged. Written notice of cancellation shall be given to the Lessee within thirty (30) days after such damage or declaration by civil authority and thereafter the Lessee shall immediately surrender possession.

#### ARTICLE X - DEFAULT

Section 10.1 Remedies on Lessee's Default. This lease is upon the express condition that, if Lessee shall fail to pay the rent herein reserved or any part thereof as the same becomes due, or shall fail to faithfully observe and perform any other term, covenant or condition of this lease, or shall abandon the Premises, or shall suffer this lease or any estate or interest hereunder to be taken on execution, or shall suffer any mechanic's or materialmen's lien to attach to said Premises, and shall fail to secure the discharge or release thereof within a reasonable time after the entry of any judgment or order of a court of competent jurisdiction for the foreclosure or other endorsement of the lien and the breach or default shall continue for a period of thirty (30) days after delivery of a written notice of any such breach or default by personal service, registered mail or certified mail, then in that event, Lessor may at once reenter the Premises and, upon or without the entry, at its option, terminate this lease without any further service or notice

or legal process, and may expel and remove from the Premises, Lessee and those claiming under it and its effects and Lessor may store, remove and dispose of any of Lessee's improvements or personal property at Lessee's expense, and may then or at any time before or thereafter bring an action for summary possession of said Premises, all without prejudice to any other remedy or right of action which Lessor may have for arrears of rent or other breach of contract; PROVIDED, HOWEVER, that if the nature of the default, other than nonpayment of rent is such that the same cannot be reasonably cured within a thirty-day period, Lessee shall not be deemed to be in default if Lessee shall, within the period, commence a cure and thereafter diligently prosecute the same to completion.

Section 10.2 Nonwaiver. The acceptance of rent by Lessor or its agent shall not be deemed to be a waiver by it of any breach by Lessee of any covenant contained herein or of Lessor's right to reenter for breach of condition.

#### ARTICLE XI - SURRENDER, HOLDING OVER

Section 11.1 Surrender of Premises. At the end of the term of this lease or other earlier termination of this lease, Lessee will peaceably deliver to Lessor possession of the Premises together with all improvements thereon by whomsoever made, in good repair, order and condition, reasonable wear and tear and unavoidable casualty excepted.

The Lessee may, at its option, remove any trade fixtures placed on the Premises by Lessee which can be reasonably removed from the Premises. If the Lessee fails to remove any personal property or trade fixtures that Lessee has informed Lessor will be removed from the Premises, after thirty (30) days written notice by Lessor, the Lessor may remove such trade fixtures and personal property from the Premises and either deem them abandoned and dispose of them or place them in storage at the cost and expense of Lessee, and the Lessee does agree to pay all costs and expenses for disposal, removal, or storage of the trade fixtures and personal property.

Lessee shall permit Lessor or its agent to enter the Premises upon reasonable prior notice to (a) inspect the Premises, (b) make such alterations, maintenance, or repairs therein as may be required under this lease or pursuant to any law, (c) show the Premises to prospective purchasers or mortgagees or to ground or underlying lessors, or (d) serve or post all notices required by law or permitted by this lease.

Section 11.2 Holding Over. If Lessee shall remain in possession of the Premises after the expiration of the lease term without executing or intending to execute a document extending or renewing this lease, Lessee shall be deemed to occupy the Premises as a tenant from month to month at the rent herein reserved, subject to all the other terms, covenants, and conditions herein contained insofar as the same are applicable to a month-to-month tenancy. Both Lessor and Lessee have the right to terminate such month-to-month tenancy with at least ninety (90) days prior written notice to the other party.

## ARTICLE XII - NOTICE

Section 12.1 Notice. Any rental invoice, notice, demand, request, consent, approval, or communication that either party desires or is required to give the other party or any other person and any rental invoice from the Lessor to the Lessee shall be in writing and either served personally or sent by prepaid, first class mail. Any notice, demand, request, consent, approval, or communication that either party desires or is required to give to the other party shall be addressed to the other party at the address set forth below. Any rental invoice from the Lessor to the Lessee shall be addressed to the Lessee at the address set forth below. Either party may change its address by notifying the other party of the change of address. Notice shall be deemed communicated within forty-eight (48) hours from the time of mailing if mailed as provided in this paragraph.

To the Lessor at: Makai Marina, LLC  
Post Office Box 367  
Waimca, Hawaii 96796

To the Lessee at: State of Hawaii  
Department of Land and  
Natural Resources  
Attn: Lease No. \_\_\_\_\_  
Honolulu, Hawaii 96813

## ARTICLE XIII - SUBORDINATION, ESTOPPEL, ATTORNMENT

Section 13.1 Lease Subordinate to Mortgages. This lease shall be subject and subordinate to the lien of any mortgage in any amount or amounts whatsoever now existing or hereafter placed on the land and buildings of which the Premises form a part without the necessity of any other instrument or act on the part of the Lessee to effectuate the subordination, provided the mortgagee named in any mortgage shall agree that in the event of foreclosure it will not join the Lessee as a party defendant in the foreclosure action and will not take any action to terminate this lease so long as the Lessee is not in default hereunder. The Lessee covenants and agrees to execute and deliver upon demand a further instrument or instruments evidencing the subordination of this lease to the lien of any mortgage or mortgages as may be required by the Lessor.

Section 13.2 Ground Lease. Lessee shall not be responsible to pay any ground rents or ground rent increases or master ground lease payments or ground lease increases to Lessor.

Section 13.3 Attornment. Lessee agrees to attorn to the assignee, transferee, or purchaser of Lessor's interest from and after the date of notice to Lessee of any assignment, transfer or sale. in the same manner and with the same force and effect as though this lease were made, in the first instance, by and between Lessee and the assignee, transferee or purchaser. If any



proceedings are instituted for foreclosure, or in the event of the exercise of the power of sale under any mortgage or deed of trust made by Lessor covering the Property, Lessee shall, upon Lessor's request, attorn to the purchaser upon any foreclosure or sale and recognize the purchaser as the Lessor under this lease. Lessee's attornment is contingent on compliance by the assignee, transferee, or purchaser with section 14.12.

Section 13.4 Transfer Documents. In the event of any such sale, assignment, mortgage, transfer or hypothecation, Lessee will promptly execute any and all documents, including but not limited to consents and true and accurate estoppel certificates, as may be deemed necessary to the transaction by the Lessor. Further, in the event that for any business purpose of Lessor it shall be necessary for Lessor that Lessee execute documents, including but not limited to consents and estoppel certificates, Lessee agrees to execute any and all of said documents, provided only that the documents accurately and truthfully reflect the matters contained therein.

The Lessee shall upon and after written notice, received as designated in Section 12.1, act upon the requested document. The Lessee shall respond within the time period of ten (10) business days or such additional time period the Lessee may request.

#### ARTICLE XIV - GENERAL

Section 14.1 Time is of the Essence. Time is of the essence in all provisions of this lease.

Section 14.2 Hawaii Law; Venue; Jurisdiction This lease shall be construed, interpreted, and governed by the laws of the State of Hawaii. The venue for any judicial action with respect to this lease shall be in the county or city and county in which the Property is situated. All parties to this agreement shall submit to the jurisdiction of the State Courts of the State of Hawaii for all purposes relating to this lease.

Section 14.3 Exhibits - Incorporation in Lease. All exhibits referred to are attached to this lease and hereby are deemed incorporated by reference.

Section 14.4 Singular and Plural. When required by the context of this lease, the singular shall include the plural.

Section 14.5 Headings. The article and paragraph headings herein are inserted only for convenience and reference and shall in no way define, describe or limit the scope or intent of any provision of this lease.

Section 14.6 Successors and Assigns. The term "Lessor" as used herein shall include the Lessor, its successors and assigns, and the term "Lessee" as used herein shall include the Lessee and its successors and assigns.

Section 14.7 Partial Invalidity. If any term, provision, covenant or condition of this lease should be held by a court of competent jurisdiction to be invalid, void or unenforceable, the remainder of this lease shall continue in full force and effect and shall in no way be affected, impaired or invalidated thereby.

Section 14.8 Lessee's Improvements to the Premises. Lessee, at Lessee's sole cost, shall be responsible to make and complete improvements of a double gate with a width between 20 and 24 feet to access TMK (4) 1-2-006:003 from the Kikiaola Small Boat Harbor and place crushed rock as needed to reduce dust at either end of the haul road on tmk (4) 1-2-006:003 (hereafter "Lessee's Required Improvement"). Lessee shall not make any alterations, repairs, improvements or additions within the Premises, or attach any fixtures or equipment therein (collectively called "Lessee Work"), without obtaining Lessor's prior written consent, which shall not be unreasonably withheld. Performance of Lessee's Required Improvements and Lessee Work shall be at the sole expense of Lessee.

Section 14.9 DOA Work. Lessor understands that the purpose of this Lease is to allow the Lessee to lease land as the non-federal sponsor for the use by the DOA as part of a Project Cooperation Agreement dated August 8, 2005 by and between The Department of the Army and State of Hawaii for Construction of the Kikiaola Light Draft Harbor Navigation Improvements, Island of Kauai, Hawaii ("Project"). The Project's purpose is for maintenance of the general navigation features of the Project and the dredged or excavated material disposal facilities on Kauai. Lessor understands that the DOA will be using the Premises as a work area (including the right to utilize soil from the site to construct temporary berms on the Premises to contain dredged material to be temporarily placed on the Premises for dewatering purposes; move, store and remove equipment and supplies; erect and remove temporary structures on the land; trim, cut, fell and remove from the Premises trees, underbrush, obstructions, and any other vegetation; and perform any other work necessary and incident to the execution of the Kikiaola Light Draft Harbor Project), and will be solely responsible to make and complete DOA work related to the Project. Lessor understands that the DOA will be contracting DOA work and that this DOA work will not require the Lessor's prior written consent or notice from the DOA for work to be done (except for the notice from DOA/ACOE of commencement of operations, as set forth in Section 1.2 above).

Section 14.10 Americans with Disabilities Act (ADA) Compliance. The Lessor shall comply with the mandates of the Americans with Disabilities Act of 1990, any amendments thereto, and the regulations promulgated thereunder, on all new construction and alterations of nonresidential facilities, including the Premises herein. All new construction and alterations must be made "readily accessible to and usable by" disabled individuals. The Lessor shall obtain approval from the Disability and Communication Access Board of the plans for the construction or alteration of any public buildings, facilities, and sites in compliance with the Americans with Disabilities Act Accessibility Guidelines (ADAAG) as required by HRS section 103-50. The Lessor shall be responsible to pay any fees charged by the Disability and Communication Access Board for review of the plans, including, but not limited to review of the plans for Lessee's

Required Improvements mentioned under Section 14.8 above.

Section 14.11 Days. Days shall mean calendar days unless otherwise specified.

Section 14.12 Tax Clearances. Final payment under this lease agreement shall be withheld pending receipt of tax clearances for Lessor from the State of Hawaii Department of Taxation (DOTAX) and the Internal Revenue Service (IRS) as required by Hawaii Revised Statutes section 103-53. If Lessor assigns this lease agreement, the assignee shall be required to provide tax clearances from DOTAX and the IRS. Lessor agrees to register with Hawaii Compliance Express and receive certification of vendor compliance to fulfill the requirements of this section.

Section 14.13 Notarized Signatures. Lessor's notarized signature(s) is attached and made a part of this document.

Section 14.14 Special Management Area. Lessee represents and warrants, to the best of its knowledge, and for only as to the Lessee, that this lease and performance of activities on the Premises are exempt from State of Hawaii and County of Kauai Special Management Area ("SMA") laws and regulations including but not limited to statutes set forth in Section 205A of the Hawaii Revised Statutes and the rules and regulations adopted by the County of Kauai in regard to SMAs.

Section 14.15 Authority. Lessor and Lessee each warrant and represent to each other that the individuals executing this lease are duly authorized to execute and deliver this lease and, once fully executed and delivered, this lease constitutes a valid, legal and binding obligation enforceable in accordance with the terms and conditions contained herein.

Section 14.16 Binding Effect. This lease shall bind and benefit the parties to this lease and their legal representatives and successors in interest.

Section 14.17 Severability. If a court of competent jurisdiction holds any provision of this lease invalid or unenforceable in whole or in part for any reason, the validity and enforceability of the remaining clauses shall not be affected.

Section 14.18 Lessee's Financial Obligation and Commitment. Lessee's financial obligation and commitment to make payments or reimbursements of any kind under this Agreement shall be contingent upon the availability and allotment by the Director of the Department of Budget and Finance of public funds to the Department of Land and Natural Resources and the Department of Accounting and General Services to make such payment or reimbursement.

Section 14.19 Entire Agreement; Modification; Executed in Counterparts. This lease contains all the agreements of the parties and cannot be amended or modified except by a written

agreement. This lease may be executed in counterparts, each of which shall be deemed an original regardless of the date of its execution and delivery. All of such counterparts together shall constitute one and the same lease, binding all of the parties hereto, notwithstanding all of the parties are not signatory to the original or the same counterparts. For all purposes, including, without limitation, recordation, filing and delivery of this lease, duplicate unexecuted and unacknowledged pages of the counterparts may be discarded and the remaining pages assembled as one document.

[SIGNATURES ON THE FOLLOWING PAGE]

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be duly executed on the day, month, and year first above written.

MAKAI MARINA, LLC, a Hawaii limited liability company

By: \_\_\_\_\_  
Print Name \_\_\_\_\_  
Its: \_\_\_\_\_  
Date: \_\_\_\_\_

LESSOR

STATE OF HAWAII

Approved by the Board of Land and Natural Resources at its meeting held on

\_\_\_\_\_

By: \_\_\_\_\_  
SUZANNE D. CASE  
Chairperson  
Board of Land and Resources  
Date: \_\_\_\_\_

LESSEE

APPROVED AS TO LEGALITY, FORM, EXCEPTIONS, AND RESERVATIONS:

\_\_\_\_\_  
DANIEL A. MORRIS  
Deputy Attorney General  
Date: \_\_\_\_\_

**ACKNOWLEDGMENT**

STATE OF HAWAII )  
 ) SS.  
CITY AND COUNTY OF HONOLULU )

On this \_\_\_ day of \_\_\_\_\_, 200\_, before me personally  
appeared \_\_\_\_\_, to me personally known, who, being by me duly sworn or  
affirmed, did say that such person executed the foregoing instrument as the free act and deed of  
such person, and if applicable in the capacity shown, having been duly authorized to execute  
such instrument in such capacity.

\_\_\_\_\_  
Notary Public, State of Hawaii  
Print Name \_\_\_\_\_  
My commission expires: \_\_\_\_\_

Notary Seal Affixed:  
  
\_\_\_\_\_

Date of the Notarized Document: \_\_\_\_\_

Number of Pages: \_\_\_\_\_

Identification or Description of the Document being Notarized:  
\_\_\_\_\_  
\_\_\_\_\_

Printed Name of Notary: \_\_\_\_\_ Circuit

Notary's Signature and Notary's Official Stamp or Seal \_\_\_\_\_ Date

# EXHIBIT A



**LEGEND:**

[Hatched Box]	WORK STORAGE AND EMBANKMENT AREA
[Dashed Line]	CONSTRUCTION LIMITS
[Solid Line]	RIGHT OF ENTRY EASEMENT LIMITS
[Dotted Line]	TRACT PROPERTY BOUNDARY
[Hatched Box]	CONTRACTOR TRAIL ROUTE

**NOTES:**

- RIGHT OF ENTRY AND CONSIDERING OF USE FOR EACH TRACT ARE SHOWN IN SECTION 61.99.30 OF THE SPECIFICATIONS.
- THE CONTRACTOR SHALL INSTALL TEMPORARY TRAFFIC CONTROL BARRICADES TO INCLUDE SIGNS, BARRICADES, ETC. TO CONTROL TRAFFIC AT PUBLIC PARK AND PARKING AREA ALONG CONSTRUCTION TRAIL ROUTE.
- DATE OF THE AERIAL IMAGE IS FEBRUARY 15, 2016.

SCALE 1" = 200'  
0 100 200

US ARMY CORPS OF ENGINEERS HONOLULU DISTRICT CIVIL WORKS TECHNICAL BRANCH PORT BAYVIEW, HAWAII		SHEET IDENTIFICATION <b>CS101</b>	
KILAUEA LIGHT DRAFT HARBOR MAINTENANCE BREEDING KENNEL ISLAND OF KAULA, HAWAII AREA PLAN		DATE: 02/15/16 DRAWN BY: [Name] CHECKED BY: [Name] PROJECT NO.: [Number] SHEET NO.: [Number]	

State of Hawaii  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
Division of Boating and Ocean Recreation  
Honolulu, Hawaii 96819

November 10, 2016

Board of Land and Natural Resources  
State of Hawaii  
Honolulu, Hawaii

**Declare Project Exempt From Requirements of Chapter 343, HRS, and Title 11,  
Chapter 200, Hawaii Administrative Rules**

**Kikiaola Light Draft Harbor Maintenance Dredging  
Kekaha, Kaua'i, Hawaii**

The U.S. Army Corps of Engineers, Civil and Public Works Branch (ACOE), is planning to dredge the entrance channel and a portion of the harbor basin at Kikiaola Light Draft Harbor, Kaua'i, Hawaii. This dredging project is necessary to remove accumulated sand/sediment that is currently posing a navigation and safety hazard. Federal funds have been secured to implement the project.

The Division of Boating and Ocean Recreation (DOBOR) is requesting that the Board of Land and Natural Resources (Board) declare the subject project exempt from the requirements of Hawaii Revised Statutes, Chapter 343 to prepare an Environmental Assessment (EA), due to the use of State land and funds. State lands are being used by ACOE to conduct dredging operations and State funds are necessary to temporarily lease land adjacent to the harbor currently owned by Kikiaola Land Company, Limited, for use as the contractor's work, storage, and dredge material dewatering site.

In accordance with the "Project Cooperative Agreement (PCA) Between the Department of the Army and the State of Hawaii for Construction of the Kikiaola Light Draft Harbor Navigation Improvements, Island of Kauai, Hawaii, dated August 8, 2005," DOBOR is responsible to provide a dredge material dewatering site for maintenance dredging projects implemented by ACOE. The dredged material, after dewatering, will be hauled and properly disposed of at the nearby Kekaha Landfill.

In accordance with Hawaii Administrative Rule (HAR) Section 11-200-8(A) and the Exemption List for the Department of Land and Natural Resources (DLNR), Approved by the Environmental Council, on June 5, 2015, this project is exempt from the preparation of an EA pursuant to the following exemptions:

Item No. 6 of Exemption Class 1: "Maintenance dredging of small quantities of material from existing launching ramps, navigation channels, and berthing areas, not to exceed their originally designed depths and as permitted by the U.S. Army Corps of Engineers, Honolulu District, under a Nationwide Permit 35 (Maintenance Dredging of Basins), with disposal of dredged material at approved landfill sites or the placement of sand on adjacent areas in accordance with HRS 205A-44."

Pursuant to Chapter 343, HRS, and Chapter 11-200, HAR, the attached Exemption Notification labeled Exhibit A was prepared. Also attached is a Site Plan, labeled Exhibit B, showing the dredging boundaries and contractor's work/storage/dewatering area. The ACOE's "Record of Environmental Consideration (REC)" is also attached, labeled Exhibit C, in which it was determined that the project qualifies under a Categorical Exclusion from the National Environmental Policy Act and therefore does not require that an Environmental Assessment or Environmental Impact Statement be prepared. The REC also determined that a permit from the ACOE Regulatory Program is not required as the proposed project is being implemented by the ACOE Civil and Public Works Branch and all necessary Federal Agency consultations have been completed as part of the REC environmental review process.

**APPROVED BY THE BOARD OF  
LAND AND NATURAL RESOURCES  
AT ITS MEETING HELD ON  
NOV 10 2016**

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Item J-4

EXHIBIT 2



Declare Project Exempt From Requirements of  
Chapter 343, HRS, and Title 11, Chapter 200,  
Hawaii Administrative Rules; Kikiaola Light Draft  
Harbor Maintenance Dredging, Kekaha, Kaua'i, Hawaii

November 10, 2016

Item J-4

**RECOMMENDATION:**

Declare that, after considering the potential effects of the proposed project as provided by Chapter 343, HRS, and Chapter 11-200, HARS, this project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.

Respectfully submitted,



EDWARD R. UNDERWOOD  
Administrator

Approved For Submittal:



SUZANNE D. CASE  
Chairperson

Attachments: Exhibit A – Exemption Notification  
Exhibit B – Site Plan  
Exhibit C – Federal Record of Environmental Consideration

DAVID Y. HOE  
GOVERNOR OF HAWAII



**STATE OF HAWAII**  
**DEPARTMENT OF LAND AND NATURAL RESOURCES**

POST OFFICE BOX 621  
HONOLULU, HAWAII 96809

November 10, 2016

SUZANNE D. CASE  
CHAIRPERSON  
BOARD OF LAND AND NATURAL RESOURCES  
COMMISSION ON WATER RESOURCE MANAGEMENT

KFKOA KALUHIWA  
CHAIRPERSON

JEFFREY T. PEARSON  
DEPUTY DIRECTOR, WATER

AQUATIC RESOURCES  
DEPARTMENT OF LAND AND NATURAL RESOURCES  
BOARD OF CONSERVATION  
COMMISSION ON WATER RESOURCE MANAGEMENT  
CONSERVATION AND COASTAL LANDS  
CONSERVATION AND RESOURCES CONSERVATION  
PROGRAMS  
LAW ENFORCEMENT  
HISTORIC PRESERVATION  
KAIKOLA ISLAND DISTRICT COMMISSION  
LAND  
STATE PARKS

**EXEMPTION NOTIFICATION**

Regarding the preparation of an environmental assessment pursuant to Chapter 343, Hawaii Revised Statutes (HRS), and Chapter 11-200, Hawaii Administrative Rules (HAR).



<b>Project Title:</b>	Kikiaola Light Draft Harbor Maintenance Dredging, Kauai, Hawaii
<b>Project Number:</b>	To be determined
<b>Project Description:</b>	This project consists of maintenance dredging of the harbor entrance channel and a portion of the harbor basin, including dewatering of dredged material on land adjacent to the harbor with final disposal at a landfill.
<b>Chapter 343 Trigger(s)</b>	Use of State Funds and Lands
<b>Exemption Class &amp; Description:</b>	Exemption Authority: Exemption List for the Department of Land and Natural Resources approved by the Environmental Council on June 5, 2015. Scope of Work: Maintenance dredging of existing harbor entrance channel and basin. Exemption Class 1: Operations, repairs or maintenance of existing structure, facilities, equipment, or topographical features, involving negligible or no expansion or change of use beyond that previously existing.
<b>Exemption Item Number and Description:</b>	Item No. 6 of Class 1 - Maintenance dredging of small quantities of material from existing launching ramps, navigation channels, and berthing areas, not to exceed their originally designed depths and as permitted by the U.S. Army Corps of Engineers, Honolulu District, under a Nationwide Permit 35 (Maintenance Dredging of Basins), with disposal of dredged material at approved landfill sites or the placement of sand on adjacent areas in accordance with HRS 205A-44.
<b>Consultation:</b>	The following agencies/entities were consulted, see attached records of consultation. <ul style="list-style-type: none"> <li>• County of Kaua'i, Department of Public Works, Solid Waste Management Division</li> <li>• Kikiaola Land Co., Ltd. (adjacent landowner to Kikiaola LDH)</li> <li>• U.S. Army Corps of Engineers, Honolulu District</li> </ul>
<b>Recommendation:</b>	It is anticipated this project will have minimal or no significant effect on the environment and is presumed to be exempt from the preparation of an environmental assessment

Suzanne D. Case, Chairperson

11/29/16  
Date



**EXHIBIT B**

	PERAKA LIGHT CRAFT HARBOR MAINTENANCE BUILDING KONA, ISLAND OF HAWAII	US ARMY CORPS OF ENGINEERS HONOLULU DISTRICT 3000 KALANANOLU BLVD HONOLULU, HI 96860	PROJECT NO. 100-10101 DRAWING NO. 100-10101-01 DATE: 10/22/2008	DESIGNED BY: [ ] CHECKED BY: [ ] DATE: [ ]	APPROVED BY: [ ] DATE: [ ]	TITLE: AREA PLAN	
	AREA PLAN	CIVIL ENGINEER (PROFESSIONAL) LICENSE NO. 100-10101	PROJECT NO. 100-10101 DRAWING NO. 100-10101-01 DATE: 10/22/2008	DESIGNED BY: [ ] CHECKED BY: [ ] DATE: [ ]	APPROVED BY: [ ] DATE: [ ]	TITLE: AREA PLAN	TITLE: AREA PLAN

## EXHIBIT C

REC-Kikiaola Light Draft Harbor Maintenance Dredging, Kekaha, Island of Kauai, Hawaii

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### RECORD OF ENVIRONMENTAL CONSIDERATION (REC)

**Date:** 07 October 2016

**Proponent:** US Army Corps of Engineers, Honolulu District  
CEPOH-PP-C, Building 230  
Fort Shafter, Hawaii 96858-5440

**Purpose of REC:**

To satisfy the requirements for environmental review as required by the National Environmental Policy Act, 42 U.S.C. 4321, et seq. (NEPA); Council on Environmental Quality Regulations, 40 CFR 1500-1508; and the Civil Works Program of the U.S. Army Corps of Engineers, Procedures for Implementing NEPA, 33 CFR 230.

**1. Official Project Title:** Kikiaola Light Draft Harbor Maintenance Dredging, Kekaha, Island of Kauai, Hawaii

**2. Date of Proposed Action (approx.):** FY 2017

**3. Description of Proposed Action:**

3.1 The US Army Corps of Engineers, Honolulu District (USACE) through the Civil and Public Works Branch under the Operations and Maintenance (O&M) program proposes to conduct maintenance dredging of the entrance and access channels at Kikiaola Light Draft Harbor (KLDH) located along the southwest coast of the island of Kauai between the towns of Kekaha and Waimea (See Appendix 1 for drawings of project site location).

3.2 KLDH was originally constructed by the State of Hawaii in 1959. A federal project authorized under Section 101 of the River and Harbors Act of 1968 modified the state harbor to provide navigational improvements designed to reduce the occurrence of dangerous breaking wave conditions within the entrance channel and allow for the safe passage of vessels entering the basin harbor. The federal project features consisted of a dredged 725-foot-long entrance channel varying in width from 105 to 205 feet to a depth of 11 feet, a dredged 320-foot-long access channel varying in width from 70 to 105 feet to a depth of 7 feet, removal of an existing 150 feet outer east breakwater stub, raising the crest elevation and flattening the seaward slope of approximately 764 feet of the existing east breakwater, removing and reconstructing the 71-foot-long inner east breakwater, and modifying 245 feet of the seaward portion of the existing west breakwater. The project was completed in 2009 which rendered KLDH to be a federal harbor supported by the USACE O&M program.

3.3 Purpose and Need. The overall purpose of the proposed action is to maintain safe navigation at KLDH. Accumulation of sediments within KLDH has resulted in shoaling within the

harbor's entrance and access channels which presents a hazard to safe navigation. This maintenance dredging project is needed to restore KLDH to its designed depths and ensure continued safe vessel navigation.

Since initial construction of the federal improvements at KLDH in 2009, approximately 16,000 cubic yards of material has shoaled into the entrance and access channels based on hydrographic survey data collected on September 18, 2009 and April 1, 2013. Projecting volume requirements through the anticipated contract performance period, it is estimated that approximately 20,000 cubic yards of material would need to be dredged from the KLDH entrance and access channels in order to restore the harbor's designed depth and to ensure continued safe vessel navigation.

The proposed maintenance dredging would be executed through the use of either hydraulic or mechanical dredging methods. The dredged material would be dewatered within an earthen bermed portion of an undeveloped parcel adjacent to KLDH. The dewatered material would then be transported to the existing Kekaha Landfill for disposal and potential beneficial reuse as landfill cover material. The project drawings provide a graphical representation of the work that would be involved (See Appendix 1). The project is anticipated to take 1 1/2 years to complete following contract award. In-water dredging work is anticipated to last 45 days.

**3.4 Scope of Work.** The major elements of the scope of work include: premobilization activities which include the development and approval of work plans, site safety and health plans, logistics; mobilization which includes development of temporary construction staging and dewatering areas; dredging of accumulated sediments at KLDH through either hydraulic or mechanical dredging methods; dewatering of the dredged material; transportation of the dewatered spoils to the existing Kekaha Landfill as the upland disposal site; and, demobilization which includes the restoration of the temporary construction staging and dewatering areas to their original condition.

The proposed project will have less than significant impacts to the human and natural environment. Conditions and Best Management Practices (BMPs) for the proposed project that resulted from the consultation and coordination processes with the agencies/offices identified in the table in Section 4 of this REC shall be developed and/or executed during the project (See Appendices 2 through 5 for reference). These conditions and BMPs have been incorporated into the project's plans and specification, Section 01 57 20 Environmental Protection, for compliance by the selected contractor. Conditions and BMPs specific to this project that supplement the generalized text of Section 01 57 20 are presented below:

Prior to mobilization, the contractor shall develop and submit to USACE for acceptance as part of their overarching Environmental Protection Plan:

- A Water Quality Monitoring Plan that will address, at a minimum, sampling frequency and locations, sampling and analysis methodology, recordation and submission of analytical results, and the procedures to be taken when analytical results exceed

acceptable water quality criteria and conditions and procedures under which dredging work may resume.

- An Archaeological Monitoring Plan that, along with the name and resume of their archaeologist, will describe, at a minimum, the duties, responsibilities and procedures that the archaeological monitor will perform for archaeological monitoring during all on-shore ground disturbances, dealing with inadvertent discovery of artifacts, and notification and reporting procedures.
- The Contractor's environmental protection plan shall describe his scheme for minimizing construction-related turbidity in nearshore waters. Construction-related turbidity at the project sites shall be controlled so as to meet Hawaii State Water Quality Standards (WQS) (DOH HAR 11-54) for the type and class of waters in which the project is located. Effective silt containment devices shall be deployed to isolate the construction activity, to minimize the transport of potential pollutants, and to avoid the potential degradation of receiving water quality and the marine ecosystem. Periodic monitoring shall be conducted immediately outside the silt containment devices and at control stations to verify that WQS are not being exceeded due to project construction. In-water construction shall be curtailed during sea conditions that are sufficiently adverse to render the silt containment devices ineffective. If monitoring indicates that the turbidity standard is being exceeded due to construction activities, the Contractor shall suspend the operations or operations causing excessive turbidity levels until the condition is corrected.

During mobilization, the contractor shall:

- Provide an archaeological monitor who shall be present for all on-shore ground disturbance. If during excavation or other construction activities any previously unidentified or unanticipated historical, archaeological, and cultural resources are discovered or found, all activities that may damage or alter such resources will be temporarily suspended. Resources covered by this paragraph include but are not limited to: any human skeletal remains or burials; artifacts; shell, midden, bone, charcoal, or other deposits; rock or coral alignments, pavings, wall, or other constructed features; and any indication of agricultural or other human activities. Upon such discovery or find, immediately notify the Contracting Officer so that the appropriate authorities may be notified (State Historic Preservation Division, etc.). Artifacts will be left undisturbed, and Contractor shall cease all activities that may result in impact to or the destruction of these resources. Secure the area and prevent employees or other persons from trespassing on, removing, or otherwise disturbing such resources.
- Minimize interference with, disturbance to, and damage to fish, wildlife, and plants including their habitat.
- Be responsible for the protection of threatened and endangered animal and plant species including their habitat in accordance with Federal, State, Regional, and local laws and regulations.
- Train all personnel on terrestrial and marine protected species that may occur in the

project area and the protections afforded to these species.

- Not allow personnel to interact with any protected species. If any protected species are encountered in the work area, they shall not be disturbed and allowed to leave the work area on their own accord.

During dredging operations, the contractor shall:

- Designate a competent person to search/monitor the work site and areas adjacent to the authorized work for ESA-listed species. Searches and monitoring shall be made prior to the start of work each day, including prior to the resumption of work following any break of more than 30 minutes. Additional periodic searches and monitoring throughout the work day are strongly recommended.
- To the extent practicable, work in the aquatic environment will be scheduled to avoid coral spawning and recruitment periods (May through September) and sea turtle nesting and hatching periods.
- Dredging will be restricted to daylight hours. Lighting may be required for safety and/or security of the vessels and/or storage areas. All lighting will be downward shielded so as not to attract protected and migratory birds.
- Specific Best Management Practices (BMPs) to avoid and minimize disturbance and injury to marine protected species include the following:

BMPs for collision with vessels:

- ✓ Vessel operators shall alter course to remain at least 100 yards from whales, and at least 50 yards from other marine mammals and turtles.
- ✓ Vessel operators shall reduce vessel speed to 10 knots or less when piloting vessel in the proximity of marine mammals, and to 5 knots or less when piloting vessels in areas of known or suspected turtle activity.
- ✓ If approached by a marine mammal or turtle, the vessel operator shall put the engine in neutral and allow the animal to pass.
- ✓ Vessel operators shall not encircle or trap marine mammals or sea turtles between multiple vessels or between vessels and the shore.

BMPs for direct physical contact:

- ✓ Before any equipment, anchor(s), or material enters the water, a responsibly party, i.e. permittee/site manager/project supervisor, shall verify that no ESA-listed species are in the area where the equipment, anchor(s), or materials are expected to contact the substrate. Equipment operators shall employ "soft starts" when initiating work that directly impacts the bottom. Buckets and other equipment shall be sent to the bottom in a slow and controlled manner for the first several cycles before achieving full operational impact strength or tempo.
- ✓ All objects lowered to the bottom shall be lowered in a controlled manner. This can be achieved by the use of buoyancy controls such as lift bags, or the use of cranes, winches, or other equipment that affect positive control over the rate of descent.
- ✓ Avoid moving the suction head through the water column while the pump is turned on.

**BMPs for exposure to elevated noise levels:**

- ✓ For any equipment used in undertaking the authorized work (i.e. dredging, minor excavation) a mandatory shut-down range of 50 meters will ensure that no ESA-listed marine animals are exposed to harmful sound levels.
- ✓ Maintenance dredging, in-water excavation, and benthic core sampling shall not be undertaken if any ESA-listed species is within 50 yards of the authorized work, and those operations shall immediately shut down if an ESA-listed species enters within 50 yards of the authorized work.
- ✓ Operation of buoy acoustic release systems shall cease when marine mammals are within 250 yards (safety zone). It is recommended that the Contractor survey of the safety zone around the vessel/buoy 30 minutes prior to activating the acoustic release, to 30 minutes following the end of transducer operations.

**BMPs for maintenance dredging:**

- ✓ With the exception of the actual dredging apparatus (e.g. clamshell buckets, or the scoop and articulated arm of a backhoe, hydraulic head, etc.) heavy equipment will be operated from above and out of the water
- ✓ Use of hydraulic dredging must include the installation of excluded devices adequate to prevent the entrainment or impingement of protected marine species, such as turtles
- ✓ The portions of the equipment that enter the water will be clean and free of pollutants
- ✓ Appropriate silt containment devices must be used and properly installed.
- ✓ Dredged material must be disposed of at upland sites or at an EPA designated ocean disposal site provided sediment standards are met.
- ✓ The use of trailing section hopper dredge, "dustpan", or "cutterhead" dredging is not authorized.
- ✓ If suction dredging is used, openings no larger than 36 inches in diameter and intake velocities of 4.6 meters at the source and 95 cm per second at 1 meter may be used. To avoid lethal entrainment or dismemberment of sea turtles or Hawaiian monk seals, suction head openings larger than 12 inches in diameter will either be screened, operated or monitored by a diver, or behind a barrier (e.g. coffer dams or silt curtains).



**4. Environmental Resource Agency Coordination:**

This action has been coordinated with the following agencies/offices:

	<b>Agencies/Jurisdiction</b>	
✓	Hawaii Coastal Zone Management. <i>(Coastal Zone Management Act)</i>	By letter dated August 11, 2016, the Hawaii CZM program concurred with the USACE federal consistency determination with conditions and BMPs (See Appendix 2 for correspondence).
✓	Hawaii State Historic Preservation Division (SHPD) <i>(National Historic Preservation Act)</i>	By letter dated July 22, 2016, SHPD concurred with USACE determination of “no adverse effect” with archeological monitoring for land-based activities (See Appendix 3 for correspondence).
✓	US National Marine Fishery Service (NMFS) <i>[Endangered Species Act (ESA), Marine Mammal Protection Act (MMPA), Magnusen-Stevens Act (MSA)]</i>	ESA: By letter dated July 6, 2016, NMFS concurred with USACE determination of “may affect but not likely to adversely affect” for consulted on protected species with BMPs (See Appendix 4 for correspondence).  MMPA: Per NMFS, MMPA consultation was included within the ESA consultation.  MSA: USACE made action agency determination of no effect.
✓	US Fish & Wildlife Service (FWS) <i>[Fish and Wildlife Coordination Act (FWCA), ESA, Migratory Bird Treaty Act (MBTA)]</i>	FWCA: FWCA concluded with issuance of Final Phase 1 Planning Aid Report dated December 2014 with recommendations (See Appendix 5 for correspondence).  ESA/MBTA: USACE made action agency determination of no effect.
✓	US Army Corps of Engineers Regulatory Program. Department of Army (DA) Permit. <i>[Section 10 Rivers and Harbors Act (RHA), Section 103 of Marine Protection Research and Sanctuaries Act (MPRSA), Section 404 of Clean Water Act (CWA)]</i>	Not Applicable. USACE Regulatory Office determined that a DA permit is not needed for this proposed action.
✓	HDOH Clean Water Branch (CWB) <i>(NPDES-Stormwater)</i>	USACE submission to CWB is in development. (see discussion of checklist item 5.b of this REC)

**5. Environmental Impact Checklist and Analysis**

The checklist table assesses potential impacts with respect to the construction and/or operational impacts of the proposed action. Discussion on the “yes” or “may” responses immediately follows the table.

**Environmental Impact Checklist**

Environmental Area	Checklist Questions	Yes	No	May
1. Air Quality	Will the proposal cause air emissions such as smoke, dust, suspended particles, or air pollutants during construction or operation?	✓		
2. Haz. Materials Haz. Waste Toxic Substances	a) Will the proposal result in the use, treatment, storage, and/or disposal of hazardous materials or wastes?		✓	
	b) Will the proposal result in alteration or disposal of existing facilities?		✓	
3. Solid Waste	Will the proposal result in the disposal of solid waste, which requires special handling such as lead based paint debris and asbestos containing materials?		✓	
4. Water Quality	Is there potential for accidental spills of hazardous or toxic substances?			✓
5. Topography and Soils	a) Will there be alterations to topography, i.e. site grading that could potentially increase soil erosion?	✓		
	b) Will the construction involve disturbance of one acre or more of ground surface?	✓		
6. Natural Resources	Will the proposal affect undeveloped areas, endangered or threatened species, a plant or animal critical habitat(s)?			✓
7. Archaeological & Historic Resources	a) Will the proposal alter or destroy any archaeological sites or buildings that are over 50 years old?		✓	
	b) Will the proposal require any excavation, trenching, or grading activity?	✓		
8. Land Use	Will the proposal alter the present land use of an area?		✓	
9. Noise	a) Will the proposal cause an increase in noise levels during implementation or construction?			✓
	b) Will the completed project increase noise levels during operating hours?		✓	

**Item 1. Air Quality.** Construction and dredging activities may cause slight increases in air emissions from equipment during these operations and may generate dust and particulates during earth moving activities. Air emissions from contractor equipment is not expected to raise the level of criteria pollutants above Federal and State ambient air quality standards. BMPs will be established and executed during the project to ensure that impacts from dusts and particulates will be minimized. Any impacts would be short term, lasting only through the duration of field activities, and will not significantly impact the human or natural environment.

**Item 4. Water Quality.** Dredging activities will cause the disturbance of bottom sediments within KLDH that may affect water quality. There may be the potential for accidental spills of petroleum and/or hazardous materials during field activities. BMPs and/or conditions to avoid and/or minimize water quality impacts developed through consultation and coordination with agencies described in Section 4 of this REC are included within the project's specifications. The selected contractor would be required to comply with these specifications and shall develop an Environmental Protection Plan that would detail how they intend to comply with the specifications.

**Item 5.a. Topography and Soils.** During construction, trenching and/or grading would be required for development of the staging/dewatering areas to support the maintenance dredging operation. Appropriate BMPs will be employed to minimize the potential for sedimentation and erosion. Any exposed soil during development of the staging/dewatering areas, dewatering operations and when returning the areas back to its original condition upon demobilization would be protected from erosion after exposure and stabilized as soon as practicable. The potential erosional impacts would last only through the period of field activities and will not significantly impact the human or natural environment.

**Item 5.b. Topography and Soils.** Construction of the temporary staging/dewatering area will involve the disturbance of approximately five acres of ground surface. USACE will be seeking a stormwater permit from the HDOH CWB that is currently in development. Any BMPs and/or conditions arising from this process will be incorporated into the project's plans and specifications, as applicable.

**Item 6. Natural Resources.** USACE completed informal consultation with NMFS and received their concurrence that the project may affect but not likely to adversely affect the Central North Pacific green sea turtle Distinct Population Segment, hawksbill sea turtle, Hawaiian monk seal and Hawaiian monk seal critical habitat with included BMPs. These BMPs and other BMPs and conditions that were developed during the consultation and coordination processes with other agencies and offices are incorporated into the project's plans and specifications that the selected contractor would be required to comply with (See Section 3.4 of this REC for discussion).

**Item 7. b. Archaeological and Historic Resources.** Excavation would be required to develop the temporary staging/dewatering areas. USACE consulted with the SHPD on the project and received their concurrence that the project would have no adverse effect with the inclusion of a precautionary measure to conduct archaeological monitoring during ground disturbing activities. This measure has been included in the project's plans and specification (See Section 3.4 of this REC for discussion) that the selected contractor would be required to comply with.

**Item 9. Noise.** There may be increases in ambient noise levels due to operation of dredging and support equipment during field activities. The project work area is distant from populated areas. These activities would be limited to daylight hours and are expected to be temporary and short term, lasting only through the period of dredging activities, and will not significantly

impact the human or natural environment.

#### **6. Determination of Categorical Excluded Actions:**

As defined in 40 CFR 1508.4 (CEQ Regulations), "Categorical exclusion" means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal Agency in implementation of these regulations (Sec. 1507.3) and for which, therefore, neither an environmental assessment nor an environmental impact statement is required. A review of the proposed action and the independent analysis of environmental impacts (Section 5), indicate that the action as identified and described in this document does not individually or cumulatively have a significant effect on the human environment and qualifies as a categorical exclusion as provided for under Council on Environmental Quality (CEQ) Regulations at 40 CFR 1508.4 and the Civil Works Program of the U.S. Army Corps of Engineers, Procedures for Implementing NEPA, 33 CFR 230. In addition, technical analysis showed that the proposed action does not involve extraordinary circumstances (40 CFR 1508.4) that may significantly impact public health & safety, natural resources, and cultural resources. Therefore, it is determined that this action is categorically excluded from the requirement to prepare an environmental assessment or an environmental impact statement.

The Categorical Exclusion references are in 33 CFR 230.9(b) and 33 CFR 230.9(c):

*33 CFR 230.9(b). "Activities at completed Corps projects which carry out the authorized project purposes. Examples include routine operation and maintenance actions, general administration, equipment purchases, custodial actions, erosion control, painting, repair, rehabilitation, replacement of existing structures and facilities such as buildings, roads, levees, groins and utilities, and installation of new buildings utilities, or roadways in developed areas."*

The proposed project at KLDH involves maintenance dredging of the entrance and access channels to remove accumulated sediments that has caused shoaling within KLDH that presents a hazard to safe navigation. Consultations and coordination with agencies and offices has been conducted. BMPs and conditions resulting from these processes have been incorporated into the project's plans and specifications. Compliance with these BMPs and conditions will ensure that the project, individually or cumulatively, will not have a significant effect on the human environment. Furthermore, the proposed project does not involve extraordinary circumstances that may significantly impact public health & safety, natural resources, and cultural resources.

*33 CFR 230.9(c). "Minor maintenance dredging using existing disposal sites."*

The proposed project at KLDH is a minor maintenance dredging project. The dewatered spoils will be taken to the existing Kekaha Landfill for potential beneficial reuse as landfill cover.

**7. Requirements from Agency Coordination:**

This REC does not relieve the proponent from compliance with other applicable Federal, State, and Local environmental requirements and other general or specific requirements, restrictions, and practices set forth as a result of resource agency coordination.

Prepared by:

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